BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHRISTIE LYNN TRULL Claimant	)	
VS.	)	
JOHNSON'S GENERAL STORES, INC. Respondent	)	Docket No. 1,017,272
AND	)	
FARMLAND MUTUAL INS. CO. Insurance Carrier	)	

ORDER

Respondent and insurance carrier request review of the February 20, 2006 Award by Administrative Law Judge John D. Clark. The Board heard oral argument on June 21, 2006.

APPEARANCES

Gary K. Albin of Wichita, Kansas, appeared for the claimant. Jeffrey E. King of Salina, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. The parties agreed the Administrative Law Judge's (ALJ) Award was mistakenly calculated based upon a 13 percent whole person functional impairment instead of the 9.5 percent whole person functional impairment awarded by the ALJ.

ISSUES

The ALJ found the claimant sustained a 9.5 percent functional impairment to the body as a whole based on an average of Drs. Estivo and Murati's ratings.

The respondent requests review of the following: (1) whether the claimant's accidental injury arose out of and in the course of employment; (2) nature and extent of

disability; (3) whether the claimant is entitled to medical treatment expenses; (4) award computation; and, (5) average weekly wage. Respondent initially argues claimant failed to testify regarding when she suffered accidental injuries and consequently, she failed to meet her burden of proof that she suffered accidental injury. Respondent next argues claimant suffered two separate scheduled injuries, a traumatic injury to her right knee and a separate series of injuries to her left knee. Finally, respondent argues the claimant's medical expert inappropriately used both the range of motion and diagnosis based estimate to arrive at his impairment rating. Consequently respondent argues that rating should be disregarded and the treating physician's rating adopted.

Conversely, claimant argues she met her burden of proof to establish she suffered bilateral knee injuries as a result of work and that a 13 percent whole person functional impairment should be awarded.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The evidentiary record, including the claimant's application for hearing as well as the medical reports, establishes that on May 5, 2003, claimant was performing her job for respondent installing a computer at one of respondent's stores. Claimant was carrying a computer when she tripped on a rug and fell landing on both knees on a concrete floor.

Claimant described an onset of pain in both knees but noted the right knee pain was worse. She initially sought treatment with her family physician and an MRI of the right knee performed on July 1, 2003, revealed a lateral meniscus tear. Respondent referred claimant to Dr. Kenneth Jansson. On August 19, 2003, Dr. Jansson performed arthroscopic surgery on claimant's right knee. The surgery consisted of a partial lateral meniscectomy as well as chondroplasty of the patella, lateral femoral condyle and lateral tibial plateau.

Claimant continued to experience pain in her right knee after the surgery. And her left knee continued to bother her. At the request of claimant's attorney, Dr. Pedro A. Murati examined claimant on July 27, 2004, and made treatment recommendations. In his report of that visit the doctor noted claimant's fall injured both knees but because the right knee pain was worse, the right knee was initially the focus of treatment. It was further noted that the claimant's left knee pain worsened due to limping.

On September 20, 2004, Dr. John P. Estivo performed an independent medical evaluation of claimant. In his report the doctor noted that claimant had bilateral knee pain after her fall and that at the time of his examination claimant complained of bilateral knee

pain with worsening left knee pain due to walking with a limp.[1] Upon physical examination the doctor noted claimant had a slight antalgic gait due to her bilateral knee pain. Dr. Estivo recommended an MRI of both knees.

On November 10, 2004, MRI of the bilateral knees was taken. The MRI of the right knee revealed that the remaining lateral meniscus appeared to have a tear. The MRI of the left knee revealed a small tear of the posterior horn of the left lateral meniscus. Dr. Estivo was designated the treating physician. On January 25, 2005, Dr. Estivo performed surgery on claimant's right knee. The surgery consisted of a partial lateral meniscectomy to the posterior horn as well as chondroplasty of the patella, lateral femoral condyle and lateral tibial plateau. On March 29, 2005, Dr. Estivo performed surgery on claimant's left knee. The surgery consisted of a partial lateral meniscectomy to the posterior horn region as well as chondroplasty to the patella and lateral femoral condyle.

Both Drs. Murati and Estivo attributed claimant's bilateral knee problems to her work injuries. Dr. Estivo opined claimant suffered a 4 percent impairment to the right lower extremity and a 2 percent impairment to the left lower extremity. Although the ALJ concluded those ratings would result in a 6 percent whole person functional impairment such ratings would actually compute to a 3 percent whole person functional impairment. Dr. Murati opined claimant suffered an 18 percent impairment to the right lower extremity and a 16 percent impairment to the left lower extremity. The doctor combined and converted those ratings to a 13 percent whole person functional impairment.

The respondent argues claimant never testified as to when her accident or accidents occurred. As previously noted, the claimant's application for hearing detailed when she alleged she suffered injury, the medical reports detailed when she suffered injury and claimant provided uncontroverted testimony regarding how the accident occurred. Moreover, respondent admitted it was provided with timely notice. The claimant has met her burden of proof that she suffered accidental injury arising out of and in the course of her employment.

Respondent next argues that claimant suffered two separate scheduled injuries. The claimant testified that when she fell she landed on both knees. Both knees became painful but because the right knee was worse the initial treatment focused on that knee. Nonetheless claimant noted that her left knee continued to bother her while she was initially receiving treatment and surgery for her right knee. Then claimant noted a worsening of her left knee pain as she limped due to pain from the right knee. This was noted in the Drs. Murati's and Estivo's reports. And upon Dr. Estivo's first examination of claimant he noted claimant walked with an antalgic gait.

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[1] Estivo Depo., Ex. 2.

When a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.[2] The Board acknowledges that where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause, it would not be compensable.[3]

In *Jackson*[4], the Court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1.)

In this case claimant injured both knees in her fall, but treatment was focused on the right knee pain which claimant noted hurt worse than her left knee. Gradually her left knee pain worsened as she walked with an antalgic gait from the right knee problems. Dr. Murati concluded the left knee impairment was caused by overuse or cumulative trauma from favoring the right side. The left knee worsening was a natural and probable consequence of the right knee injury.

Moreover, claimant testified that she injured both knees in the fall at work and the left knee continued to be painful as she initially received treatment focused on her right knee. In *Logsdon*[5] the Kansas Court of Appeals noted that in the determination whether an injured worker's condition is a natural consequence of the primary injury or a new and distinct injury a distinguishing fact is whether the prior underlying injury had fully healed. If not, subsequent aggravation of the injury even when caused by an unrelated accident or trauma may still be a natural consequence of the original injury. Consequently, claimant's testimony establishes that after the initial injury her left knee continued to bother her and had never healed from that injury and worsened as she limped. Again, this establishes that claimant's left knee injury was a natural consequence of the primary injury.

The Board is mindful that Dr. Estivo opined claimant's left knee injury was the result of her work activities after the fall in 2003. The Board does not find this opinion persuasive as the doctor's testimony ignores his own initial physical examination of claimant where he noted claimant walked with an antalgic gait and her report that limping aggravated her left

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[2] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

[3] *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

[4] *Jackson v. Stevens Well Service*, supra.

[5] *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, 128 P.3d 430 (2006).

knee. Consequently, the Board finds claimant suffered bilateral parallel knee injuries as a result of her fall at work on May 5, 2003.

The Workers Compensation Act recognizes two classes of injuries other than those which result in death or total disability, and those are permanent disability to a scheduled part of the body and permanent partial general disability.[6] "When a specific injury and disability is a scheduled injury under the Workmen's Compensation Act, the benefits provided under the schedule are exclusive of any other compensation."[7] K.S.A. 44-510c(a)(2) has been extended by case law to allow compensation for certain combination injuries to be based on permanent partial disability.[8]

In *Murphy*[9], the Supreme Court held that simultaneous aggravation to both arms and hands through repetitive use removes the disability from a scheduled injury and converts it to a general disability. "Where a claimant's hands and arms are simultaneously aggravated, resulting in work-related injuries to both hands and arms, the injury is compensable as a percentage of disability to the body as a whole under K.S.A. 44-510e."[10]

In *Honn,* the Supreme Court noted that the schedule of injuries found at R.S. Supp. 1930, 44-510(3)(c)(1) to (20) failed "to provide compensation for both members when they are in pairs."[11] The court then analogized to the permanent total disability statute and concluded that "when two feet are injured, as in the case before us, the compensation should not be computed for each one separately, as for the injury to one foot as provided by the schedule, but should be computed [as a body as a whole injury]."[12] K.S.A. 44-510c(a)(2) has been amended since *Honn* and now provides, in relevant part, "[l]oss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability."

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[6] *See* K.S.A. 44-510d; K.S.A. 44-510e.

[7] *Berger v. Hahner, Foreman & Cale, Inc.*, 211 Kan. 541, 545, 506 P.2d 1175 (1973).

[8] *See Hardman v. City of Iola*, 219 Kan. 840, 844, 549 P.2d 1013 (1976); *Downes v. IBP, Inc.*,10 Kan. App. 2d 39, 691 P.2d 42 (1984), *rev. denied* 236 Kan. 875 (1985).

[9] *Murphy v. IBP, Inc.*, 240 Kan. 141, 727 P.2d 468 (1986)

[10] *Id.* at 145; *see also Depew v. NCR Engineering & Manufacturing*, 263 Kan. 15, Syl. ¶ 1, 947 P.2d 1 (1997).

[11] *Honn v. Elliott*, 132 Kan. 454, 458, 295 Pac. 719 (1931).

[12] *Id.*

Finally, in *Pruter,*[13] the Kansas Supreme Court reaffirmed the applicability of the *Honn* rule to the loss of use of parallel limbs that caused substantial impairments. While *Pruter* dealt with simultaneous injuries from a single accident, the Board believes the rule is likewise applicable to a series of accidents, especially where repetitive trauma injuries are treated as a single accident.[14]

The Board finds the Supreme Court's analysis in *Pruter*, coupled with the language of K.S.A. 44-510c(a)(2), requires an award based upon a general body disability and not two separate scheduled injuries under K.S.A. 44-510d.

The Board is mindful of the language in *Mathena*[15] which indicated that *Pruter* says the *Honn* exception was only applicable to the loss of use of parallel limbs where simultaneous injuries caused substantial impairments. *Pruter* is factually distinguishable because that case involved an acute injury to extremities on the same side. *Mathena* is factually distinguishable because the separate injuries were not identical and therefore not parallel. In this case, the injuries occurred to both parallel extremities. In addition, claimant's pain and permanent work restrictions constitute substantial impairment to her ability to function and required respondent to change her job duties in order to allow her to continue her employment. Absent respondent's accommodation the claimant's restrictions would impact her ability to obtain and retain employment. Moreover, Dr. Murati opined that as a result of the knee injuries claimant will eventually require bilateral total knee replacements. As a result of her parallel extremity injuries the claimant has suffered substantial impairment.

Moreover, a substantial impairment is obviously recognized in parallel extremity injuries in the first instance because in the absence of proof to the contrary, injuries to parallel extremities are presumed to constitute a permanent total disability.[16] And *Honn* noted that at no place in the scheduled disability statute does it provide for compensation for loss of use of both parallel members. Therefore, if the evidence establishes that the injury to both parallel members does not result in permanent total disability then, because the schedule does not provide for loss of use of both parallel members, the injury must be compensated based upon a permanent partial disability pursuant to K.S.A. 44-510e which specifically provides the method to compensate for injuries not covered by the schedule in K.S.A. 44-510d. That statutory analysis in *Honn* was the basis for determination that parallel extremity injuries could not be compensated as two separate scheduled disabilities.

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[13] *Pruter v. Larned State Hospital*, 271 Kan. 865, 26 P.3d 666 (2001).

[14] *See Depew v. NCR Engineering & Manufacturing*, 263 Kan. 15, 947 P.2d 1 (1997); and *Casco v. Amour Swift-Eckrich*, 34 Kan. App. 2d 670, 128, P.3d 401 (2005).

[15] *Mathena v. IBP, Inc.,* 33 Kan. App. 2d 956, 111 P. 3d 182 (2005).

[16] K.S.A. 44-510c(a)(2).

Stated another way, because the schedule in K.S.A. 44-510d does not provide for loss of use of both parallel members, if simultaneous injuries to parallel extremities do not result in permanent total disability, then such injuries must be compensated pursuant to K.S.A. 44-510e.

Medical evidence is not essential to the establishment of the existence, nature and extent of an injured worker's disability.[17] Furthermore, the finder of fact is free to consider all the evidence and decide for itself the percentage of disability.[18] In this case the doctors' whole person functional impairment ratings range from 3 percent to 13 percent. The claimant has undergone three knee surgeries and continues to have ongoing bilateral knee complaints. The Board adopts and affirms the ALJ's determination claimant suffers 9.5 percent whole person functional impairment.

Although the parties at regular hearing indicated that they were almost in agreement on claimant's average weekly wage, that issue was left open. Claimant testified regarding her average weekly wage and based upon that testimony the ALJ determined claimant's average weekly wage was $591.20. The Board agrees and affirms.

Finally, at hearing before the Board the parties agreed that the ALJ's award of future medical compensation upon proper application should be affirmed and, as previously noted, the computation of the award, if affirmed, should be recalculated based upon a 9.5 percent whole person functional impairment. Accordingly, the award of future medical upon proper application is affirmed and the award will be recalculated based upon a 9.5 percent whole person functional impairment.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge John D. Clark dated February 20, 2006, is modified to recalculate the award based upon a 9.5 percent whole person functional impairment and affirmed in all other respects.

The claimant is entitled to 6.47 weeks of temporary total disability compensation at the rate of $394.15 per week or $2,550.15 followed by 39.42 weeks of permanent partial disability compensation at the rate of $394.15 per week or $15,537.39 for a 9.5 percent functional disability, making a total award of $18,087.54, which is due and ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

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[17] *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[18] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

Dated this _____ day of August 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Gary K. Albin, Attorney for Claimant
Jeffrey E. King, Attorney for Respondent and its Insurance Carrier